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Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

No. 95-994

In The
Supreme Court of the United States
October Term, 1995

TYSON FOODS, INC. and WLR ACQUISITION CORP.,
Petitioners,

v.

WLR FOODS, INC., *et al.*,
Respondents.

Brief in Opposition to Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

BRIEF IN OPPOSITION

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29 pp

QUESTION PRESENTED

Tyson Foods, Inc. invokes the Constitution in an effort to have this Court resurrect a corporate takeover attempt adamantly rebuffed by the shareholders of WLR Foods, Inc. The shareholders, in a special referendum conducted pursuant to Virginia corporation law, voted overwhelmingly against Tyson's acquisition proposal and, despite a five-month tender offer campaign by Tyson, repeatedly refused to tender their stock. In following this Court's controlling decision in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987), the Fourth Circuit Court of Appeals upheld the constitutionality of Virginia corporation laws which gave WLR shareholders a direct, collective voice and vote in their company's future.

The proper question presented, therefore, is:

Whether this Court should now revisit and overrule its *CTS* decision and, under the Constitution's Supremacy or Commerce Clauses, nullify Virginia corporation laws enfranchising WLR shareholders on a proposed acquisition of their company.

LIST OF PARTIES AND RULE 29.1 LIST

Tyson Foods, Inc. (Tyson) is the Petitioner. WLR Foods, Inc. (WLR) is a publiciy traded company managed by its Board of Directors (Board). WLR and its directors (Directors) are the Respondents in this proceeding. WLR has no parent corporation. Its subsidiaries are Wampler-Longacre, Inc., Cassco Ice & Cold Storage, Inc., Valley Rail Service, Inc., WLR Poultry Products, Inc., May Supply Company, Inc. and Rockingham Poultry, Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST . . .	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
I. FACTUAL BACKGROUND	2
A. Tyson's Approach at WLR	2
B. After expert advice and study, WLR's Directors reject Tyson's proposal. . .	4
C. Tyson creates its own problems and delay	6
D. WLR shareholders refuse to tender stock	7
E. WLR shareholders' vote rejects Tyson	7

F. After Tyson's large operating losses, it terminates the tender offer 9

II. PROCEDURAL BACKGROUND . . . 10

A. Tyson engaged in posturing. 10

B. The District Court's three sets of injunctive rulings. 13

C. Tyson delays appeals 14

REASONS FOR DENYING THE WRIT 14

I. THE APPEALS COURT CORRECTLY APPLIED THIS COURT'S CONTROLLING DECISION IN *CTS* 15

A. This Court's 1987 *CTS* decision controls the decision in this case. 15

1. *No Williams Act preemption.* 15

2. *No Commerce Clause violation* . . . 17

B. In evaluating the Virginia corporation laws, the Court of Appeals correctly applied *CTS*. 19

1. *Virginia's nonintegrated corporation laws* 19

2. *No Williams Act preemption of Virginia corporation laws* 20

3. *Virginia's corporation laws not violative of the Commerce Clause* . 22

II. NO SPLIT EXISTS AMONG THE CIRCUIT COURTS ON THE CONSTITUTIONALITY OF STATE CORPORATION LAWS AFFECTING TAKEOVERS 23

III. ANY DECISION BY THIS COURT WOULD HAVE VERY NARROW APPLICATION 25

A. This case is fact-specific and complicated 25

B. Virginia's Business Judgment Statute is unique 25

C. Only two Virginia statutes are directly implicated 26

IV. THIS IS A SINGULARLY INAPPROPRIATE TIME TO ADDRESS THE SALE AND ACQUISITION PROVISIONS OF STATE CORPORATION LAW 26

V. FURTHER REVIEW WOULD SERVE ONLY TO FRUSTRATE AND DELAY THE FINALITY OF THE DEMOCRATIC VOTE OF SHAREHOLDERS 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Page(s)**

Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989) 23, 24

CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) . . . . . *passim*

Edgar v. MITE Corp., 457 U.S. 624 (1982) . . . 16

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 24

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 22

Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977) 15, 16, 23

WLR Foods, Inc. v. Tyson Foods, Inc. 65 F.3d 1172 (4th Cir. 1995) . . . . . *passim*

West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205 (1994) 20

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. VI, cl. 2 1

U.S. Const. Art I, § 8, cl. 3 1

28 U.S.C. § 1254 1

Va. Code § 13.1-646 ..... 2, 19

Va. Code § 13.1-690 ..... 2, 19

Va. Code § 13.1-725 ..... 2, 20

Va. Code § 13.1-728.1 2

Va. Code § 13.1-728.3 20

MISCELLANEOUS

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S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) 15

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 65 F.3d 1172 (4th Cir. 1995) and reprinted in the Appendix to the Petition. The Opinions and final judgment of the United States District Court for the Western District of Virginia, Harrisonburg Division, also are included in the Appendix to the Petition.

JURISDICTION

This Court has jurisdiction to review the Court of Appeals' judgment by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). No other basis for jurisdiction exists.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause, Art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Commerce Clause, Art. I, § 8, cl. 3, provides:

> The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states and with the Indian Tribes . . . .

The relevant federal and Virginia statutes are set forth in the Appendix to the Petition. References to the four Virginia corporation statutes challenged by Tyson are: the Rights Statute, Va. Code § 13.1-646 (App. 103a); the Business Judgment Statute, Va. Code § 13.1-690 (App. 103a-104a); the Affiliated Transactions Statute, Va. Code § 13.1-725, *et seq.* (App. 104a-116a); and the Control Share Statute, Va. Code § 13.1-728.1, *et seq.* (App. 116a-127a).

STATEMENT OF THE CASE

Tyson, having failed in its protracted tender offer campaign of two years ago, hopes to continue what now obviously is little more than a plan of attrition against the shareholders of a smaller competitor. The factual and procedural background of this effort illuminates Tyson's intent and the misstatements reflected throughout its Petition.

I. Factual Background.

In its Petition, Tyson repeats certain contentions which it advanced but were rejected by both the District Court and the Fourth Circuit Court of Appeals (*See*, App. 26a-32a, 33a-43a). The factual background, found by the District Court and affirmed by the Court of Appeals, is essentially as follows:

A. Tyson's approach at WLR.

Tyson and WLR are business rivals in the highly competitive chicken processing industry. (App. 3a; J.A. 4784, 4935). Their stocks are publicly held and traded. Already the world's largest chicken processor, Tyson also wanted to control WLR's share of the chicken market as well as WLR's turkey business.

In late 1993, as part of its plan, Tyson initiated an informal contact with WLR about a business combination. Telephone conversations ensued, and WLR even granted personal meetings with Tyson representatives. WLR also supplied Tyson with certain requested public documents about WLR. Within just several weeks of its initial approach at WLR, Tyson informed WLR that it would be issuing what Tyson's Chairman, Don Tyson, termed a "bear-hug" letter: the first step in a takeover plan to subdue a target company's board of directors. At an initial meeting about the Tyson initiative, the WLR Directors preliminarily believed that the shareholders would want WLR to remain independent. The consensus of the Board, however, was that it should carefully consider the forthcoming, formal Tyson proposal and make an informed judgment. On the same day that Chairman Don Tyson issued to the WLR Board his bear-hug letter on the acquisition, WLR wrote its shareholders about the developments. The letter, while pointing out that WLR had not been for sale, told shareholders:

> As it must, WLR Foods Board will meet in the near future to evaluate Tyson's offer. Be assured that your Board will listen carefully to its advisors and management and make a decision it believes is in the best interest of, and appropriately protects, our shareholders, employees, and producers. In this regard, the Board's historical commitment to the continued independence of WLR Foods will be keenly important.

(App. 3a; J.A. 2155-62, 2397-98, 2767-68).

B. After expert advice and study, WLR's Directors reject Tyson's proposal.

Although the WLR Directors are highly experienced in the poultry industry, they also hired independent experts to advise them. The advisors, for example, included Goldman, Sachs & Co., regarded as an outstanding investment banking firm; and Sullivan & Cromwell, a New York law firm highly respected for its expertise in corporate mergers and acquisitions. (App. 3a, 4a, 37a). The advisors enjoyed complete access to WLR's most sensitive strategic plans and financial information and to its facilities. (J.A. 2059, 2062).

On January 28, 1994, the WLR Directors met for several hours with their independent financial and legal advisors. The advisors extensively reviewed for the Directors their detailed written analyses and memoranda on the Tyson proposal. The Board took no action at this meeting, deciding instead to consider the information further and meet in a week to discuss the Tyson proposal anew.

The WLR Directors reconvened on February 4 with their financial and legal advisors in order to review the matter again. This second lengthy meeting also involved presentations by all of the Board's professional advisors. After distributing and discussing with the Board yet another detailed and updated analysis, Goldman, Sachs & Co. rendered its opinion that the proposal of $30 cash per share was inadequate. The WLR Directors, weighing all of these considerations, unanimously voted to reject the Tyson proposal and to support WLR's independence, informing its shareholders by letter. (App. 4a-5a, 37a-38a).

Realizing the inevitability of Tyson's future tactics, on February 4 WLR's Directors took other measures believed to

be in the best interests of the shareholders. Every one of these actions, unsuccessfully challenged factually and legally below by Tyson, were taken only after independently considering expert financial and legal advice. (App. 39a). The Board actions had three legitimate purposes: minimize the possibility of losing key managers because of the obvious uncertainty posed by the Tyson situation; afford as many shareholders as possible a vote in any special referendum on a Tyson acquisition; and deter Tyson from engaging in any coercive or manipulative tactics.

To such ends, on February 4 the WLR Directors unanimously approved potential severance arrangements in order to retain existing management employees. Also, because four of the senior Board members individually wanted to keep a voice as shareholders, the Board acknowledged their recent resignations as officers by amending the corporate bylaws to clarify their status solely as Board members, and, consistent with past company practice, extended them medical benefits traditionally granted to retiring officers. Lastly, to minimize abusive takeover measures by Tyson and meet Virginia corporate law requirements, the WLR Directors set a record date formula for any special shareholder vote under Virginia's Control Share Statute; adopted a shareholder rights protection plan; and authorized a declaratory judgment action on the validity of these actions to protect shareholders. (App. 4a-5a, 37a-38a, 84a-85a). According to WLR's expert testimony, these actions by WLR's Board represented legitimate business steps for a modern industrial company under similar circumstances. (J.A. 4000-06).

At a further meeting on March 11, 1994, the WLR Directors again received updated, detailed presentations from Goldman, Sachs & Co. concerning the adequacy of Tyson's

March 9, 1994 tender offer. After receiving additional advice that Tyson's offer remained inadequate, the Directors unanimously decided to recommend that WLR shareholders not tender their shares to Tyson.

After weighing the evidence of the Directors' conduct, the District Court found under Virginia corporate law that:

> Tyson presented no evidence that the directors ever received any advice from anyone stating that Tyson's $30 per share offer was adequate or that any action taken was not in the best interests of the corporation . . . .
>
> . . . .
>
> Based upon the record in this case, the decisionmaking process engaged in by WLR's directors demonstrate that their actions were taken in compliance with their good faith business judgment of the best interests of the corporation.

(App. 38a-41a). The Court of Appeals found ample support for all of the District Court's findings. (App. 26a-32a).

C. Tyson creates its own problems and delay.

In early 1994, Chairman Don Tyson had publicly praised WLR's Directors: "We at Tyson have long admired WLR Foods and the outstanding job you and your management team have done for your stockholders." (J.A. 4614). To further its acquisition plan, however, Tyson then contrived state law claims of so-called "management entrenchment" against the same WLR Directors whom shareholders had time and again reelected during annual meetings. Yet, Tyson's allegations were contradicted by the sworn testimony of its

own designated takeover strategist. James Blair, appearing before the District Court as Tyson's spokesman and key witness, acknowledged that "WLR is . . . one of the few companies in the business where management does not own control of the company." (J.A. 3455). As events transpired, Tyson created its own problems for its legal claims, the tender offer, and the shareholder referendum.

D. WLR shareholders refuse to tender stock.

Not until March 9, 1994 did Tyson give WLR's shareholders a chance to register their position through the tender offer process. (App. 5a). Contrary to representations in the Petition, WLR Directors never blocked Tyson from initiating and pursuing—and communicating extensively with WLR shareholders about—the tender offer of $30 cash per share. In fact, Tyson renewed its tender offer on three occasions. Over the course of Tyson's five-month tender offer and media promotion, WLR shareholders spurned the tender offer repeatedly. (J.A. 4004-05). Even with stock tenders made by arbitraugers to add tactical pressure for a sale, Tyson failed to entice any more than 25% of the outstanding shares of WLR stock. (J.A. 3169-70, 4004-05).

E. WLR shareholders' vote rejects Tyson.

Tyson also delayed until April 14, 1994 to request, pursuant to Virginia corporation law, a special shareholder referendum on its $30 cash per share offer. (App. 5a). Tyson chose not to give WLR's shareholders any prior notice, although Tyson knew for months that its delivery of the referendum request determined the special meeting record

date[1] and, therefore, what shareholders could vote. (J.A. 4626). The WLR Board, within 7 days of Tyson's request, promptly scheduled and announced the special shareholder meeting and referendum for May 21, 1994. (App. 5a).

According to the Tyson testimony before the District Court, the Tyson forces treated the referendum as "a campaign" and as having "a lot of similarities to a political campaign." (J.A. 3462-63). Tyson sponsored ubiquitous air and print messages and wrote to shareholders to promote its takeover. Repeated Tyson newspaper ads threatened shareholders with "losses" on their stock if Tyson failed in its bid and then punishingly dumped its shares on the market. (J.A. 5230, 5231). In its repeated communications with shareholders, Tyson implored WLR's owners to "[s]end a message to the WLR Board." (J.A. 5230-31). WLR shareholders answered: they affirmed the WLR Board's judgment in an overwhelming vote rejecting Tyson's proposal.[2] Among its various factual findings, the District Court determined that even assuming disqualification of all shareholders Tyson challenged, Tyson still polled "only 33% of shares eligible, . . . far less than the majority it needed . . . . The vote simply would not have come out differently." (App. 83a).

Tyson hopes the Court will ignore those WLR shareholders who defied the stock speculators. One such group of individuals, consisting of WLR poultry producers,

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[1]Mischaracterizing the record date formula, Tyson's Petition fails to acknowledge that the issue was not raised in the Court of Appeals. (App. 28a n. 4).

[2]Tyson received only 3,152,830 votes out of 10,896,672 eligible. (App. 29a).

acquired their stock in 1988 when they joined WLR. These WLR owners valued the long-term nature of their investment and the importance of competition in the poultry industry. Their self-styled, unsolicited petition to the WLR Directors during the referendum process said it best:

> We . . . feel strongly about keeping honest competition between poultry processors . . . . We of the WLR family have a good contract and opportunity to grow with them. We should have a choice for whom we grow and we choose WLR.

(J.A. 5232, 3488-91). Tyson's blitzkrieg of personal appearances and public radio and television commercials failed to break these and other shareholders, despite the Tyson threats in full-page newspaper ads that "Tyson will sell [its] 600,000 WLR shares and take our losses, along with you." (J.A. 5230, 5231).

F. After Tyson's large operating losses, it terminates the tender offer.

Before the District Court and in advertisements, Tyson tried teasing shareholders with the possibility of switching to a stock-swap offer, supposedly to suggest a more tax-advantaged deal. Yet, over the five-months duration, Tyson never revised its highly conditional cash tender offer.[3] Just three days after reporting its own $148 million operating loss for the latest quarter, Tyson terminated the tender offer for WLR stock on August 4, 1994. Tyson then looked for scapegoats, unsuccessfully urging the courts below to find

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[3]Tyson's tender offer conditions were extensive. (J.A. 4680-84).

that WLR's long-pursued asset purchase from Cuddy Farms, Inc. explained the concluding events. (J.A. 4085-89). Tyson's financial losses, however, spoke volumes. Moreover, WLR financial economics expert Professor Schwert's testimony provided an additional rejoinder to Tyson's excuses: "The market gradually learn[ed] that Tyson was not going to improve its initial $30 per share offer, and that its . . . offer would fail as inadequate." (J.A. 4005).

II. Procedural Background.

As it did before the Court of Appeals, Tyson laces its argument with unfounded and unsuccessful attacks against the District Court's procedural supervision of this factually complicated litigation. A brief review of the trial litigation demonstrates that Tyson, not the District Court or WLR, created delay as part of obvious posturing and attempted intimidation of WLR's Directors.

A. Tyson engaged in posturing.

The Magistrate Judge immediately accommodated Tyson's request for accelerated discovery, shortened response times for discovery, scheduled expedited times for dispositive motions, and pre-scheduled hearings for the ensuing weeks. Tyson obtained this special dispensation without filing responsive pleadings at all, much less a motion for temporary or preliminary injunctive relief. (*e.g.*, J.A. 73-101, 102). At odds with its Petition, Tyson acknowledged that it had been given "quick times" under what it recognized as "a very crowded docket." (J.A. 220). The District Court conducted numerous hearings and in-chambers conferences, granting virtually immediate audience upon request. (*e.g.*, J.A. 44, 141, 161, 225, 409). The District Court allowed Tyson to name every WLR Director as a defendant and to conduct

lengthy depositions of the Directors. (J.A. 161, 209). At Tyson's urging, the District Court even took the unprecedented step of essentially directing WLR's Board to approve meeting minutes for production "without delay" to Tyson. (J.A. 1938-47). The District Judge also readily gave procedural rulings, swiftly decided Tyson appeals from the Magistrate Judge's rulings, and promptly reviewed the voluminous submissions and ruled on numerous factual and legal issues. (*e.g.*, J.A. 102, 209, 348, 3382, 3624). In comparison, Tyson waited until the last minute to file its original responsive pleadings, its first Amended Answer and Counterclaims, its May 2 preliminary injunction motion, and filed but then aborted an interlocutory appeal to the Court of Appeals. (J.A. 104, 351, 2948, 3812).

Whenever Tyson controlled the timing, it either requested or took more time, or cited illusory time constraints. In a March 11, 1994 letter to the District Court, Tyson represented its desire and intention, in its own words, to "move promptly" for a preliminary injunction on factual and legal "narrow issues" under state law impacting the vote count on any shareholder referendum. (J.A. 220-24). Tyson fully expected "that the resolution of the narrow issues [under the Control Share Statute]. . . will eliminate the need for this Court to address the broader issues raised in Tyson's counterclaims." (J.A. 224). The District Court relied upon these representations in further accelerating the schedule. Tyson needlessly then waited a month to request the referendum and two months to file its Motion for Preliminary Injunction. All the while, Tyson's March 9, 1994 tender offer and campaign continued without interruption—and without success among WLR shareholders.

Tyson, as part of the proceedings, tried to learn WLR's strategic business plans and the bottom price WLR's Directors

might view favorably for an acquisition. To this end, Tyson wanted to espy the confidential analyses of WLR investment bankers Goldman, Sachs & Co. In ostensibly justifying this foray, Tyson devised counterclaims that WLR Directors had breached their directorial duties under Virginia corporation law, Virginia Code Section 13.1-690 (Section 690). The District Court, recognizing that Section 690 controls all corporate director duties and authorizes directors to rely upon experts, found that the proper judicial inquiry focuses on the subjective good faith business judgment of the Directors, not on the substantive merit or rationality of the decisions.[4] (App. 74a). The District Court permitted Tyson to inquire thoroughly into the procedures followed by the WLR Directors, the topics of advice and discussion, and whether the Directors followed the advice of its experts in making decisions. Indeed, the District Court mapped far-ranging discovery which Tyson chose not to pursue. *Id.*

Because of WLR's securities law filings, Tyson already knew that WLR had disclosed to its shareholders and to the public that Goldman, Sachs & Co. found the offer inadequate. WLR's Directors nonetheless endured days of questions and verified that their actions were taken in good-faith reliance upon the advice of experts whom Tyson conceded as professionally competent. (J.A. 3669). Tyson never tested through other sources the Directors' accounts of their good-faith reliance on their experts; *never* once did Tyson seek to depose the investment bankers or even WLR's chief financial officer. Tyson, of course, really cared nothing about probing

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[4]Virginia's Director Conduct Statute originates from a formulation by onetime Stanford Law School Dean Bayless Manning, who advocated a more realistic standard for modern corporate directors. *See* Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 Business Lawyer 1477, 1483 (1984).

or prosecuting its claims of directorial breach of duty. The claims simply were means to get inside WLR's boardroom and gain an advantage on a target's shareholders, an old Tyson ruse. (J.A. 4171). The voluminous evidentiary record—consisting of thousands of pages and the testimony of numerous lay and expert witnesses—belies the Petition's suggestion of curtailed inquiry and proof of germane facts.

B. The District Court's three sets of injunctive rulings.

The District Court issued three sets of rulings in this litigation, each time thoroughly explicating its findings and reasoning for denying injunctive relief. First, under the Control Share Statute, it concluded that WLR's Board legitimately had formulated a record date for shareholders to vote in the referendum; and then determined factually which votes were "interested" and could not be counted in the balloting. (App. 80a). Second, the District Court upheld the constitutionality of Virginia's Control Share Statute, Affiliated Transactions Statute, Rights Statute, and Business Judgment Statute (Section 690). (App. 49a). All of these code provisions are part of Virginia's corporation statutes. Third, after trial the District Court reached factual findings and legal conclusions that WLR's Directors had not breached their directorial duties in amending corporate bylaws, providing medical benefits for retired officers, and adopting and leaving unredeemed the rights under the shareholder protection plan.[5]

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[5]Upon stipulation, the District Court conducted final trial of "all issues" on the supplemented submissions. (App. 34a-35a; J.A. 3892). Because Tyson erroneously challenged the existence of certain documents, the District Court merely confirmed their existence, without drawing any substantive inferences. It was Tyson that originally requested an in camera review. (J.A. 1926, 1992-95, 4122).

(App. 33a). Both courts below concluded that at all times the WLR Directors had acted in good faith in the exercise of their own independent judgment of the best interests of the corporation. (App. 27a, 37a-41a).

C. Tyson delays appeals.

Delaying yet again, Tyson lingered until nearly the last day to appeal the District Court's December 6, 1994 final judgment to the Court of Appeals. The Court of Appeals, carefully analyzing all of the issues, affirmed the rulings and judgment of the District Court in its extensive September 22, 1995 opinion. Choosing not to seek any rehearing en banc on what it now urges as pressing constitutional issues, Tyson once more waited until the end of the appeal period to file its Petition with this Court.

REASONS FOR DENYING THE WRIT

Tyson comes to this Court hoping to obtain what two other courts rightly refused to do: use the Constitution to overrule the independent decision of WLR shareholders who collectively—and repeatedly—refused what they regarded as an unattractive purchase offer for their company. This Court should decline Tyson's overtures in what is a factually complicated case turning principally on state corporation law issues. The Fourth Circuit Court of Appeals rightly followed *CTS* in finding Virginia's corporation laws constitutional under the Supremacy and Commerce Clauses. There exists no controversy, much less any conflict, among any of the appeals courts on the constitutional question. Given the unique nature of this case, any ruling poses only very limited application at a time singularly inappropriate to address the sale and acquisition provisions of state corporation law.

I. THE APPEALS COURT CORRECTLY APPLIED THIS COURT'S CONTROLLING DECISION IN *CTS*.

A. This Court's 1987 *CTS* decision controls the decision in this case.

In its Petition, Tyson tries to flee the precedential reach of this Court's decision in *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987). *CTS* involved challenges, under the Supremacy and Commerce Clauses, to a control share law used as a pattern for Virginia's Control Share Statute. The Indiana law at issue in *CTS* operated to condition the bidder's voting rights and potential corporate control on approval by a majority of pre-existing disinterested shareholders. *Id.* at 74. Speaking through Mr. Justice Powell, this Court upheld the Indiana law.

1. *No Williams Act preemption.*

On the Williams Act preemption issue, this Court found no express intent by Congress to preempt state law and that compliance with both the Williams Act and the Indiana Act was possible. *Id.* at 78-79. The Indiana Act also not only did not frustrate the purposes of the Williams Act[6] but

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[6]Contrary to the Petition's suggestion, the Williams Act does not establish rules for "providing a check . . . on management." (Pet. at 19). This misleading reference is to a summary which restates only an argument presented to the committee. "It was also recognized that these bids are made for many other reasons and do not always reflect a desire to improve the management of a company. The bill is designed to require full and fair disclosure for the benefit of investors". S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967) (emphasis added). *Accord, Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 31 (1977).

furthered it by "'plac[ing] investors on an equal footing with the takeover bidder,'. . . ." 481 U.S. at 82 (quoting *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. at 30). In doing so,

> [t]he Indiana Act operates on the assumption, implicit in the Williams Act, that independent shareholders faced with tender offers often are at a disadvantage. By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers.

Id at 82-83. The Court in *CTS* also disposed of the same arguments now raised by Tyson's invocation of the inapposite, three-justice opinion in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).[7] The same reasoning utilized with the Indiana Act applies equally to the Virginia Control Share Statute:

> Unlike the MITE statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. The Act also does not impose an indefinite delay on tender offers . . . . Nor does the Act allow the state government to interpose its views of fairness between willing buyers and sellers of shares of the target company. Rather, the Act allows

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[7]Tyson misstates the *MITE* holding. (Pet. at 18). *MITE* rested on the Commerce Clause, not the Supremacy Clause as represented in the Petition. 457 U.S. at 640-46. The Illinois law under review in *MITE* is starkly different than the one in *CTS* or any of Virginia's laws; Illinois forbade acquisitions altogether unless a public official approved.

> *shareholders* to evaluate the fairness of the offer collectively.

481 U.S. at 83-84.

2. *No Commerce Clause violation.*

This Court also held that the Indiana Act, virtually identical to Virginia's Control Share Statute, did not discriminate against interstate commerce or subject it to inconsistent regulations in violation of the Constitution's Commerce Clause. The Indiana Act did not discriminate unlawfully "[b]ecause nothing in the [law] imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors . . . ." 481 U.S. at 88. Nor was there any risk of inconsistent regulation:

> So long as each State regulates voting rights only in the corporations it has created, each corporation will be subject to the law of only one State. No principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders . . . .
>
> . . . .
>
> We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law.

Id. at 89.

CTS answers, as well, Tyson's contention about any effect of Virginia's corporation laws on the success of tender offers. (Pet. at 18). Tyson's selective quotation from *CTS* is more remarkable for what it *omits* than for what it includes:

> [The] argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. *But even if true, this result would not substantially affect our Commerce Clause analysis.* . . . The very commodity that is traded in the securities market is one whose characteristics are defined by state law. Similarly, the very commodity that is traded in the 'market for corporate control'—the corporation—is one that owes its existence and attributes to state law. Indiana need not define the commodities as other states do; it need only provide that residents and nonresidents have equal access to them . . . . *Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause.*

481 U.S. at 93-94 (emphasis added).

CTS remains the controlling precedent which disposes of Tyson's arguments. The Court of Appeals quite properly relied upon *CTS* in its analysis of Virginia's corporate governance laws, whether the laws are treated separately or as a group.

B. In evaluating the Virginia corporation laws, the Court of Appeals correctly applied *CTS*.

In the Court of Appeals, Tyson's principal attacks focused on dispositive state corporation law matters such as the proper interpretation of Virginia's Business Judgment Statute (Section 690), judicial review of director conduct under that statute, whether certain WLR Directors still were employees two months after their resignations, and the vote count in the referendum. The Court of Appeals upheld the District Court not only on the factual and legal issues under state law, but also on the constitutional issues.

1. *Virginia's nonintegrated corporation laws.*

In its constitutional review, the Court of Appeals noted that the four Virginia corporation statutes actually are distinct laws enacted at different times and used for multiple applications. (App. 7a n.2). For example, the Business Judgment Statute simply sets a subjective good-faith standard for reviewing director conduct not only in tender offers but in all situations.[8] Va. Code § 13.1-690 (App. 103a-104a). The Rights Statute establishes parameters for the directors of a Virginia corporation to issue rights, warrants and options. Va. Code § 13.1-646 (App. 103a-104a). As such, it is not confined to the takeover context or simply a "poison pill" statute. Under the Control Share Statute, any shares of stock acquired in a "control share acquisition" carry no voting

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[8]Tyson contrasts Virginia's all-encompassing standard, created by the Legislature, to Delaware's common law rule of heightened judicial scrutiny in the takeover context. Tyson does not mention that the Delaware corporation statutes contain no general standard of corporate director conduct and do not afford shareholders the direct, more democratic referendum process of the Virginia Control Share Statute.

rights until such rights are granted by majority vote of all shares other than "interested shares." Va. Code § 13.1-728.3 (App. 120a-121a). Lastly, the Affiliated Transactions Statute imposes a three-year moratorium on transactions between a Virginia corporation and a person or entity owning over 10% of shares, unless approved by the board of directors and shareholders. Va. Code § 13.1-725 (App. 107a-110a). The Affiliated Transactions Statute protects shareholders against unfairly priced freeze-out transactions or corporate asset raids.

These four distinct statutes are different from the two-part, single integrated pricing order considered in *West Lynn Creamery, Inc. v. Healy*, 114 S.Ct. 2205 (1994), as remarked by the Court of Appeals. (App. 7a n.2). In a telltale sign, Tyson did not—and does not here—challenge the corporation laws individually. *Id.* The Court of Appeals, like the District Court, assumed only for purposes of constitutional analysis that the four nonintegrated statutes constituted an integrated group. *Id.*

2. *No Williams Act preemption of Virginia corporation laws.*

Regarding the federal preemption question[9], the Court of Appeals echoed this Court's observations in *CTS*: "While the Williams Act governs the process of tender offers, it leaves to the states the power to regulate substantive matters of corporate governance." (App. 10a). *Accord, CTS*, 481 U.S. at 85-86. (App. 102). In no respect, contrary to Tyson's suggestion, did the Court of Appeals hold that states are free

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[9]"[A] proper understanding of the Williams Act offers no credible support for the preemption claim." Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 Mich. L. Rev. 1862, 1868 (1989).

to determine how to protect investors in a way which unconstitutionally frustrates the Williams Act. Instead, the Court of Appeals stated:

> The means by which the Williams Act achieves its purpose of protecting investors is by requiring disclosure of information in order to allow shareholders to make an informed decision and to prevent coercion in the tender offer context; Tyson has not shown that the Virginia statutes controvert the purpose of the Williams Act by removing protection from investors, for example by keeping information from the shareholders. In fact, Tyson has not shown that the shareholders in this case were deprived of any relevant information. The goal of neutrality between bidder and target, emphasized by Tyson, is not in itself so central to the purpose of the Williams Act that the Act should be held to preempt a group of state statutes that regulate the balance between a target and a bidder, but do not disadvantage the shareholders or prevent them from gaining access to pertinent information.

(App. 12a).

As in its Petition, Tyson unpersuasively argued below that the Williams Act and, in effect, the Constitution guaranteed a takeover bidder a "meaningful opportunity to succeed" or profit from the business of making tender offers. The Court of Appeals aptly observed that the

> Williams Act does not, however, have as an independent purpose the creation of an environment for bidders that is conducive to takeover. Tyson attempts to use the 'meaningful opportunity for

> success' test to shift the focus of the Williams Act from protection of investors to protection of bidders . . . . [T]he Williams Act is simply not designed to protect a company in Tyson's position; 'the Williams Act does not create a right to profit from the business of making tender offers.'

(App. 13a). *Accord, CTS*, 481 U.S. at 93-94.

3. *Virginia's corporation laws not violative of the Commerce Clause.*

This Court's holdings in *CTS* also served as compelling authority in the Court of Appeals' Commerce Clause review. "The group of statutes at issue here . . . treats in-state and out-of-state tender offerors exactly the same . . . . There is simply no evidence of discrimination among bidders." (App. 14a). Also, there was no hoarding of a commodity by Virginia.[10] (App. 15a). Although the *CTS* Court did not invoke the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), the Court of Appeals correctly recognized that Virginia has a clear interest in regulating its own corporations[11]. *Accord, CTS*, 481 U.S. at 1651-52.

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[10]The "economic advantage" cases relied upon by Tyson are inapposite because those statutes at issue, unlike the Virginia corporation statutes, gave a competitive edge to local industry over out-of-state companies.

[11]Virginia's motivation by a "*general* belief that takeovers leading to corporate removals are unacceptably disruptive of established economic relations . . . is perfectly permissible . . . ." Donald Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp of America and Dormant Commerce Clause Doctrine; II Extraterritorial State Legislation*, 85 Mich. L. Rev. 1865, 1872 (1987).

All of the Court of Appeals' constitutional rulings comport fully with *CTS*. Its decision, too, agrees completely with the 1989 *Amanda* decision of the Seventh Circuit, the only other appeals court which has spoken to the issues raised by Tyson.

II. NO SPLIT EXISTS AMONG THE CIRCUIT COURTS ON THE CONSTITUTIONALITY OF STATE CORPORATION LAWS AFFECTING TAKEOVERS.

Until the Fourth Circuit's decision in this case, after *CTS* only the Court of Appeals for the Seventh Circuit had considered the constitutionality of state corporation codes affecting takeovers. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), *cert. denied*, 497 U.S. 955 (1989). There is no conflict—or even controversy—among the appeals courts.

In *Amanda*, the Seventh Circuit Court of Appeals held that an affiliated transaction statute even more restrictive than Virginia's did not violate the Supremacy or Commerce Clauses. *Amanda* not only dispatches Tyson's arguments about the purported "two schools of thought"[12] but provides a powerful illustration of the parameters of *CTS*'s application to a state's regulation of its own corporations. "States may regulate corporate transactions as they choose without having to demonstrate under an unfocused balancing test that the

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[12]It is most telling that Tyson can cite the Court only to a Second Circuit antitrust opinion's descriptive phrasing of an ancillary characteristic of the Williams Act. "Neutrality is, rather, but one characteristic of legislation directed toward a different purpose—the protection of investors." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977). Even After *CTS* and *Amanda*, Congress never amended the Williams Act to provide for any preemption of state corporate governance law.

benefits are 'enough' to justify the consequences." *Amanda*, 877 F.2d at 507.

Just as with the Fourth Circuit, the Court of Appeals for the Seventh Circuit rejected the "meaningful opportunity for success test" now advanced by Tyson. It held that

> [t]he Commerce Clause does not demand that states leave bidders a 'meaningful opportunity for success'. Maryland enacted a law that absolutely banned vertical integration in the oil business. No opportunities, 'meaningful' or otherwise, remained to firms wanting to own retail outlets. *Exxon Corp. v. Governor of Maryland* [cited in *CTS*, 481 U.S. at 94] held that the law is consistent with the Commerce Clause, even on the assumption that it injures consumers and investors alike. A state with the power to forbid mergers has the power to defer them for three years.

Id. at 508.

No court has ever invalidated any arguably similar state law under this test. Nor has any circuit court ever constitutionalized what is nothing more than Tyson's economic hypothesis about corporate takeovers.[13] Embraced in Tyson's meaningful opportunity test is the theory of its economist to the unsubstantiated effect that tender offers are always beneficial to shareholders and that state takeover laws operate to prevent such takeovers. As emphasized in *CTS*,

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[13]The *CTS* Court refused to accept such an hypothesis. 481 U.S. at 93 n. 13.

however, "the Constitution does not require the States to subscribe to any particular economic theory." 481 U.S. at 92.

III. ANY DECISION BY THIS COURT WOULD HAVE VERY NARROW APPLICATION.

A. This case is fact-specific and complicated.

Both the Petition and this Brief in Opposition make undeniable the factual intricacies of this corporate transactional dispute. The record is filled with innumerable issues which required the District Court to weigh the evidence and resolve questions of credibility and fact. The central issue below of the WLR Directors' good faith under Virginia law is only one example of this point. Tyson lost in large measure on those factual matters yet, in its Petition, solicits this Court to revisit the allegations which the District Court rejected. The Court of Appeals affirmed those findings, noting the record's ample support. With all of the many particularized issues and developments reflected in the record, a decision by this Court would offer little, if any, guidance for lower courts in deciding other necessarily complex and fact-specific corporate acquisition cases.

B. Virginia's Business Judgment Statute is unique.

Before the Court of Appeals, Tyson concentrated on making a state law assault on the District Court's interpretation of Virginia's Business Judgment Statute, with a hope that its claim would increase pressure on WLR's Directors to capitulate and support a sale. This state corporation statute of general application—which is one of four statutes comprising Tyson's scheme argument—is a somewhat unique state corporate code provision. No other

state has adopted Virginia's law, although the statute has been in existence for over ten years. Also, as Tyson expressed in the Court of Appeals, "[l]ess than 0.1% of all publicly-traded corporations in the United States are Virginia corporations . . . ." Op. Brief at 44 n. 29. Virginia certainly is not Delaware. Any holding, therefore, would have the narrowest force.

C. Only two Virginia statutes are directly implicated.

As currently framed by Tyson's Petition, its wholesale attack on the four Virginia corporation statutes ignores that only two of the statutes came into play. The Virginia Rights Statute and Affiliated Transactions Statute grouped in Tyson's scheme argument never impacted Tyson. Given the WLR shareholders' vote against Tyson in the Control Share referendum, the Virginia Rights Statute and the WLR rights plan required no further consideration by the WLR Board. Further, that same shareholder vote and now the supervening time have obviated any invocation or application at all of Virginia's Affiliated Transactions Statute. These considerations and the dispositive nature of the state law issues argue additionally that the Court should decline to exercise its discretionary review powers. There exists no justification for this Court simply to revisit its recent *CTS* decision.

IV. THIS IS A SINGULARLY INAPPROPRIATE TIME TO ADDRESS THE SALE AND ACQUISITION PROVISIONS OF STATE CORPORATION LAW.

Tyson contends that the mergers and acquisitions sky is falling, supposedly because other States will strengthen their

"protectionist" laws by copying Virginia's corporation statutes. According to the Petition, this Court should intervene to stem the "tide" of state corporation laws which Tyson suggests are, even today, dooming business combinations. Recent statistics, as well as the most exhaustive study yet, contend forcefully to the contrary.

In 1995, U.S. companies announced an "unprecedented" $458 billion in mergers and acquisitions. Steven Lipin, *Year-End Review of Finance 1995*, Wall Street Journal, Jan. 2, 1996 at R8. This robust merger and acquisition activity, including unsolicited takeovers, represents a 32% increase over the previous record set in 1994. In global terms, such transactions totalled an unparalled $866 billion for 1995. *Id.*

According to the most recent and comprehensive study of business transactions, state corporation laws actually have furthered shareholder interests. Dr. William Schwert, Gleason Professor of Finance at the University of Rochester, and Dr. Robert Comment of the U.S. Securities & Exchange Commission, make significant findings from their scholarly review of seventeen years of takeovers. See Robert Comment & William Schwert, *Poison or Placebo? Evidence on the Deterrence and Wealth Effects of Modern Antitakeover Measures*, 39 Journal of Financial Economics 3 (1995). In sum, they conclude that state corporation laws and shareholder rights plans "do not prevent takeovers from occurring; they do give target firms significant additional bargaining power in negotiating with a potential bidder." (J.A. 4002).

In testifying on behalf of WLR's Directors in the District Court, Professor Schwert verified that generally such "mechanisms seem to have made target shareholders better off" and that "many WLR shareholders had the opportunity

to sell their shares at prices in excess of the $30 offered by Tyson, likely because of the actions of WLR's Board in response to the Tyson offer." (J.A. 4002-04). According to Professor Schwert, "there [was] direct evidence from the market that Tyson's initial [and only] offer of $30 per share was inadequate . . . and that the initial offer would fail as inadequate . . . ." (J.A. 4003-05). Dr. Schwert's testimony contradicted the Tyson economist's views and highlighted vividly why the Constitution should not and does not compel Virginia—and the private acts of corporate directors—to adhere to a single economic theory in a competitive, global marketplace.

The merger and acquisition data for 1994 and 1995 provide the most recent empirical confirmation for the conclusions of Drs. Schwert and Comment that state corporate laws do not prevent takeovers. More importantly, with this latest record level of transactional activity, a judicial ruling impacting takeovers may only unsettle what, for shareholders' benefit, appears as a thriving market for corporate control.

V. FURTHER REVIEW WOULD SERVE ONLY TO FRUSTRATE AND DELAY THE FINALITY OF THE DEMOCRATIC VOTE OF SHAREHOLDERS.

Tyson asserts that it "remains ready to renew its Offer" of $30 cash per share if this Court will declare the four Virginia corporation laws unconstitutional and reverse the Court of Appeals' judgment. (Pet. at 9-10 n.3). That offer now is two-years old, already having failed a total of five times at the hands of WLR shareholders and the market over a five-month period in 1994. The decision by WLR shareholders under Virginia's Control Share Statute, modeled upon the law

upheld in *CTS*, deserves respect and force, without the Constitution being used as a suffrage nullification device. In addition, it now is time to spare these same shareholders—the owners of WLR—the further expense of needless litigation by Tyson, a competitor, as part of its continuing plan of acquisition. The conclusive vote and wishes of WLR shareholders, personifying the teachings of this Court in *CTS*, merit no further review.

CONCLUSION

This case is about the right and decision of shareholders to refuse an inadequate offer for the sale of their company, and a board of directors' private, good faith actions under state corporate law to defend the shareholders' collective judgment. Tyson advances nothing less than an extremist argument that the manner in which a corporation's shareholders and directors respond to acquisition proposals, consistent with a State's corporation laws, raises issues under the United States Constitution. The Court of Appeals correctly rejected that contention and the claim of illegal economic protectionism against Virginia. There exists no reason to review the Court of Appeals' decision, which properly harkened to this Court's words in *CTS*:

> It is an accepted part of the business landscape in this country for States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in providing stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs.

CTS, 481 U.S. at 91. WLR's Directors, as well as the Commonwealth of Virginia, have done nothing more than afford shareholders that effective voice.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January 19, 1996

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